No. 10211

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NATHAN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

ALBERT D. ROSELLINI,
Attorney for Appellant.

1111 Smith Tower,
Seattle, Washington.

WESTERN PRINTING CO. SEATTLE, WASHINGTON

No. 10211

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NATHAN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

ALBERT D. ROSELLINI,
Attorney for Appellant.

1111 Smith Tower,
Seattle, Washington.

WESTERN PRINTING CO. SEATTLE, WASHINGTON

CASES CITED

No. 10211

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NATHAN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

Appellee's position that appellant is not entitled to invoke the protection of the Fourth and Fifth Amendments is not sound. Appellee contends that appellant makes no claim to ownership, or to any interest in the narcotics seized. However, an examination of the records shows that appellant at no time disclaimed

interest, possession, or ownership of the narcotics, but to the contrary, always referred to the grip and the contents, which were the narcotics in question, as being his.

In his affidavit in support of his motion to suppress the evidence, appellant states that he took "his grip" (Tr. 7); that the officers took "his grip" and opened "his grip" (Tr. 8). Also, in his affidavit he states that he told the officers that he had "Ten," in referring to the narcotics in "his grip" (Tr. 8).

In the affidavit of Donald R. Smith, the narcotic agent, affiant states that the appellant admitted to him that he had obtained the opium in El Paso, Texas, for $650.00 (Tr. 12), indicating ownership in the appellant. In the affidavit of A. M. Bangs, narcotics supervisor, affiant states that appellant admitted that he had brought back with him "Ten cans" of "opium"; further, that appellant opened his bag and produced therefrom the narcotics (Tr. 16). Affiant further alleged that appellant told him that he had obtained the narcotics in El Paso, Texas, for $650.00 (Tr. 17).

The authorities cited by appellee are not in point. In *Patterson v. U. S.* (C.C.A. 9) 31 F. (2) 737, the defendant openly disclaimed ownership, and denied that the suitcase and the contents were his.

In the case of *Lewis v. U. S.*, (C.C.A. 9) 6 F. (2)

222, a search warrant was used in searching the premises. The Court held that one who claimed no interest in the property seized cannot question the validity of the search warrant.

The case of *Armstrong v. U. S.* (C.C.A. 9) 16 F. (2) 62, is to the same effect, the defendant disclaiming any interest in the property seized.

The case of *Kwong How v. U. S.,* (C.C.A. 9) 71 F. (2) 71, involved the search of the premises and the person of the defendant. The defendant in that case did not reside in the premises searched and disclaimed any interest in the property seized. The Court held that one who is not the owner or the lawful occupant of the premises searched without a warrant cannot raise the question of the lawfulness of the search.

THE SEARCH AND SEIZURE WAS UNLAWFUL

The cases cited by appellee are not helpful. In the case of *Carroll v. U. S.,* 267 U. S. 132, as pointed out in appellant's opening brief, p. 10, the facts were much stronger than in the present case.

In the case of *Husty v. U. S.,* 282 U. S. 694, cited in appellee's brief, it was held that the search and seizure were proper. However, the facts there were much

stronger than in the instant case. The prohibition officer who made the arrest testified that he had known the defendant to be a "bootlegger" for several years, had arrested him twice before for the same offense, had received a phone call that the defendant had two loads of liquor in two automobiles of particular makes and descriptions parked in particular places on certain streets. Also, the officer testified that he was well acquainted with his informant, having known him about eight years, and having had frequent contact with him both in a business and social way. He had received similar information from the informant which had always proved to be reliable. In that case, when the officers were seen by the defendant, two of his companions fled, and the officers made the search and seizure. Under these facts, there was probable cause for the search.

In the case of *King v. U. S.* (C.C.A. 9) 1 Fed. (2) 931, all of the facts are not shown, but the Court states that the officers had reliable and positive information that the defendant was engaged in transporting opium; also that the officers saw the defendant go by and return with all the curtains in his car drawn down. The Court held the search and seizure proper.

The case of *Foster v. U. S.* (C.C.A. 9) 11 F. (2) 100, is not helpful, as the facts upon which the search was based do not appear from the opinion.

The search and seizure in the case of *White v. U. S.,* (C.C.A. 9) 16 F. (2) 870, cited by appellee, was based on strong evidence. One of the inspectors, who mingled with a crowd of narcotic addicts at a certain rooming house, heard them talking about the defendant, and heard them say that the defendant sold narcotics, and that he gave a cube for $1.50. Other officers testified that just prior to the arrest, they saw the defendant walking in the direction of the rooming house, having his overcoat on with the collar pulled up, both hands in his pockets, walking fast, turning around and looking from side to side. The Court held that those facts were sufficient to justify the arrest.

In the case of *McInes v. U. S.,* (C.C.A. 9) 62 F. (2) 180, the officer received a call between midnight and one o'clock A.M. from an informer, whom he knew well, and who had furnished him previously with reliable information, that a Ford coupe with a certain license number, would go from California into Oregon early that morning, loaded with liquor. The officer saw the described Ford, with the described license number, seized the same, and found the liquor. The Court held that those facts justified the arrest without a warrant.

In the case of *Leong Chong Wing v. U. S.* (C.C.A. 9) 95 F. (2) 903, there were much stronger facts. The record therein discloses that the defendant had at a prior date been convicted of violation of the Narcotic

Act; that he was an associate of known narcotic dealers; that enforcement officers had numerous complaints of appellant's activities engaging in the illicit sale of narcotics; that the officers had information from an informant, who had been found reliable on several occasions, to the effect that appellant was about to meet a white man at a specified place for the purpose of making the sale and delivery of narcotics. On three occasions within a period of fifteen days, the officers, acting upon such information, observed appellant, while driving a car, meet the identical white man, who entered appellant's car. On the last of such occasions, the officials, having again received information from the same source, to the effect that appellant would meet a white man in appellant's car, made the arrest.

In the case of *Kwong How v. U. S.,* (C.C.A. 9), 71 F. (2) 71, the officers saw the Chinese defendant come out of a panel door of a room connected by means of a secret passage with the premises in which narcotics had been repeatedly purchased. They saw the defendant carry a satchel partially open, containing small boxes which appeared to the officers to be narcotics. The Court held that the facts justified the arrest.

In the case of *Mattus v. U. S.* (C.C.A. 9) 11 F. (2) 503, the officers sent a thoroughly searched informer into the defendant's house with marked money, to buy

narcotics, and on his return with morphine, they entered the house, arrested the defendant, and seized the morphine which the defendant's wife was trying to conceal. The defendant voluntarily admitted that he did give the morphine to the informer. The Court held that the search was proper.

In each of the cases mentioned above, cited in appellee's brief, there was before the Court a great deal more evidence than in the instant case. In each case where there was hearsay information from an informer, there was always something else to substantiate it. In the instant case, the Government has produced nothing except information furnished to the officers by an informer who had never before completed a case for the officers, and whose testimony had never been used to secure a conviction by the officers. Although the officers testify that the informer was reliable, there is nothing in the record to indicate this. They had known him for only a period of about six months, didn't know whether he had a criminal record, whether he was a narcotic addict, or anything about him. On the limited knowledge that the officers had of the informer, it cannot be said that they were justified in relying upon his information.

For the reasons set forth in appellant's opening brief, and based upon the authorities therein cited, it

is respectfully submitted that there was not probable cause for the search and seizure and the following arrest in this case.

CONCLUSION

We respectfully submit that the appellant was arrested without a warrant, a crime was not being committed in the presence of the officers, and that there was no probable cause to justify the arrest of the defendant without a warrant.

We respectfully submit that the judgment of the District Court should be reversed, and the above cause be dismissed.

Respectfully submitted,

ALBERT D. ROSELLINI,

Attorney for Appellant.